IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 111 of 2000

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RAJUBHAI KANUBHAI ACHARYA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 111 of 2000

MR YATIN OZA, Sr.Counsel with MR BUDHABHATTI
for appellant

MR ND GOHIL, APP for Respondent

CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE A.L.DAVE

Date of decision: 18/12/2003

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE A.L.DAVE)

The present appeal arises out of the judgment and order dated 31.12.1999 rendered by the learned Addl.Sessions Judge, Rajkot, in Sessions Case No. 85 of 1995 convicting the present appellant under Section 20(2) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, "NDPS Act"), sentencing him to undergo

RI for 10 years and to pay a fine of Rs.1,00,000/-, in default to undergo SI for one year.

2. The facts of the case can be stated in brief thus:

On 11th February 1995, PSI Kalubhai Ninama, while he was on duty, received a secret information at about 10 p.m. that one Raju Kanubhai Acharya was selling Charas illegally near the Culvert near School No.8. He, therefore, summoned two panch witnesses and explained to them the details, collected sealing material, weighing scale and took mutual search to ensure absence of any objectionable/contraband material. The preliminary panchnama to that effect was drawn at about 22.30 hrs. and the whole raiding party went to the place, i.e. near the Culvert near School No.8 and they found Raju Acharya, present appellant present over there. He was intercepted by the raiding officers who introduced himself as police. He was informed that there is information that the appellant has some quantity of illicit Charas which is meant for sale and therefore, he is to be searched. He was given an option that if he so desired, his search could be arranged before a Gazetted Officer or an Executive Magistrate. The appellant refused to exercise such option and said that he had no objection if he is searched in presence of the panch witnesses. On his person being searched, from the left side pocket of his trousers, a plastic bag containing 12 brown coloured tablets of Charas was found. On being asked, the appellant declared that he has no permit for the same. The tablets weighed 3 gms. They were put into polyethene bag which was again placed into a match box which was wrapped by a slip of paper, signed by the panch witnesses and the raiding Officer tied it with thread and sealed it with wax. A detailed panchnama in this behalf was prepared and the appellant was arrested. He was intimated about the reason for his arrest and the whole group returned to the Police Station. The muddamal was handed over to the PSO; the FIR was given by the raiding Officer and the offence was registered. A report in this regard was made to the superior Officer. On receipt of the report from FSL, a chargesheet was issued and the Sessions Case came to be registered. On the Sessions Case being come up for hearing, a charge was framed at Exh.4. The appellant pleaded not guilty to the charge. He was afforded legal aid for his defence.

3. The prosecution examined PSI Kalubhai at Exh.21, besides the panch witnesses and other police officials. The FSL report was also produced on record and the trial

Court, after considering the evidence on record, came to the conclusion that the charge against the accused was established by the prosecution and therefore, the learned Addl.Sessions Judge recorded the conviction and imposed the sentence as stated above.

4. Aggrieved by the said judgment and order, the convict has preferred this appeal.

5. Learned Senior Advocate Mr.Y.N.Oza appearing with Mr.Budhabhatti, learned Advocate appearing for the appellant has submitted as under:

(i) There is non-compliance of Section 42(2) of the NDPS Act.

(ii) The quantity is too small which might have been used for self consumption.

(iii) Considering the period of sentence undergone and the age of the appellant, mercy may be shown.

(iv) There is non-compliance of Section 57 of the Act.

Therefore, it was argued that the appeal may be allowed.

6. Learned APP Mr.Gohil opposed this appeal. According to him, the provisions of Section 42 of the NDPS Act will be applicable to the present case and as such, there is no non-compliance of the provisions of Section 42(2) of the NDPS Act. Learned APP submitted that the plea of small quantity for self consumption has not been taken at appropriate stage and this is only an afterthought and the benefit cannot be given to the appellant. So far as the plea regarding non-compliance of Section 57 of the NDPS Act is concerned, it is demonstrated by learned APP that the requirement has been complied with. He submitted that it is true that the appellant was found to be in possession of 3 gms. of Charas, but the information was that the Charas possessed by him was for sale. The appellant had 12 tablets with him and the necessary inference was that the same were for sale. He further submitted that the trial Court has inflicted the minimum punishment prescribed by the Legislature and as such, there is no scope for showing any indulgence by taking a sympathetic view. He, therefore, submits that the appeal may be dismissed.

7. We have considered the contentions in light of the material on record, giving a close scrutiny to the record and proceedings.

8. Admittedly, the information was in respect of the accused possessing contraband Charas for sale in a public place, i.e. near the Culvert, near School No.8. As such, when the search is conducted in a public place, the provisions of Section 42 of the NDPS Act will not be attracted. In this regard, the decision in the case of Narayanaswamy Ravishankar v. Asstt.Director, Directorate of Revenue Intelligence, reported in (2002) 8 SCC 7 can be profitably referred to. In that case, the question regarding the applicability of Sections 42 and 43 of the NDPS Act was considered by the Apex Court. It was held that if the search and seizure is conducted in a public place, it is Section 43 of the NDPS Act which is applicable and not Section 42. Therefore, the question of non-compliance, if any, of the provisions of Section 42 would be irrelevant in such cases. In the present case, the search and seizure being conducted in a public place, there is no question of compliance of the mandatory requirement of Section 42 and the provisions of the said Section will not be attracted. A Division Bench of this Court in Husen Bhenu Malad and ors. v. State of Gujarat and ors., reported in 2003 (2) GLH 705 also took the same view. Under the circumstances, the first contention regarding non-compliance of Section 42(2) of the NDPS Act cannot be accepted and the plea cannot be of help to the appellant.

8.1 The second contention that is raised regarding the possibility of the appellant possessing the quantity of Charas for self consumption being too small a quantity and the consequent applicability of Section 27 of the NDPS Act. We are not in a position to accept this contention for the reason that despite a close scrutiny of the entire record, we fail to find this plea to have been taken by the appellant either at the stage of his arrest or at the stage of framing of the charge or while recording the statement under Section 313 of the Cr.PC. Even during the course of arguments all that was contented was that the appellant may not be convicted under Section 20(2) of the NDPS Act and because of the small quantity, he may be convicted under Section 27 of the NDPS Act. At that stage also, the plea regarding the self-consumption is not taken which is a sine qua non for attracting Section 27 of the NDPS Act. This is, therefore, nothing but an afterthought and cannot be accepted in this appeal. The fact that the information was regarding the appellant in indulging in sale of Charas tablets, the fact that he was possessing as many as 12 tablets with some money in his pocket, the fact that he has not taken this plea throughout the trial and

that it is taken only at this stage, are convincing factors for not accepting the plea.

8.2 With regard to the contention that considering the period of sentence undergone by the appellant, i.e. nearly eight years and the age of the appellant, sympathy may be shown, we may state that the sentence imposed is the minimum prescribed by law and no discretion is left with the Court by Legislature to impose a sentence lesser than what is imposed and no Court of law can go beyond the letter of law. It is not possible for us to accept this contention either.

8.3 As regards the contention that there is non-compliance of the provisions of Section 57 of the NDPS Act, we find that there is no substance in this contention. There is material on record to indicate that a report in this regard was made to the immediate superior Officer as required under Section 57 of the NDPS Act, which is at Exh.25 and therefore, that plea cannot be accepted.

9. In light of the above discussion, we do not find any merit in the appeal. The reasonings adopted and the ultimate conclusion arrived at by the learned trial Court Judge are just, proper and legal and we are in full agreement with the same. No interference is warranted. The appeal, therefore, must fail and it stands dismissed. The judgment and order passed by the trial Court is hereby confirmed.

(Kshitij R. Vyas, J.)

(A.L. Dave, J.)

Sreeram.